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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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In re:

03 MDL 1570 (GBD) (FM)

4 TERRORIST ATTACKS ON SEPTEMBER  
5 11, 2001,

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New York, N.Y.

April 16, 2013

12:00 p.m.

7 Before:

HON. FRANK MAAS,

Magistrate Judge

9 APPEARANCES

10 KREINDLER & KREINDLER

11 Attorney for Plaintiff

12 JAMES KREINDLER, ESQ.

13 COZEN O'CONNOR

Attorneys for Federal Insurance Plaintiffs

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20 ALAN KABAT, ESQ.

21 CLIFFORD CHANCE

Attorneys for Dubai Islamic Bank

22 STEVE COTTREAU, ESQ.

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23 OMAR T. MOHAMMEDI, ESQ.

24 Attorney for Wamy International

25 MARTIN F. McMAHON, ESQ.

Attorney for Rabita Trust

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(Case called)

(In open court)

THE COURT: This is a conference on In Re: Terrorist Attacks on September 11, 2001. Counsel, state your appearances for the record.

MR. KREINDLER: Good morning, your Honor. James Kreindler from Kreindler & Kreindler.

MR. CARTER: Good morning, your Honor. Sean Carter from Cozen O'Connor.

MR. HAEFELE: Good morning, your Honor. Robert Haeefe from Motley Rice.

MR. GOLDMAN: Good morning. Jerry Goldman for the O'Neill plaintiffs and plaintiffs executive committee.

MR. TARBUTTON: Good afternoon, your Honor. Scott Tarbutton, Cozen O'Connor.

MR. KABAT: Good afternoon, your Honor. Alan Kabat from Bernabei and Wachtel.

MR. COTTREAU: Good afternoon, your Honor. Steve Cottreau from Clifford Chance on behalf of Dubai Islamic Bank.

MS. BERGOFFEN: Good afternoon, your Honor. Ronnie Bergoffen on behalf of Dubai Islamic Bank from Clifford Chance.

MR. MOHAMMEDI: Good morning, your Honor. Omar Mohammedi on behalf of Wamy International.

MR. McMAHON: Good morning, your Honor. Martin McMahon on behalf of Rabita Trust.

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1 THE COURT: Good morning. Hiding in the back.

2 MR. McMAHON: I'm trying to avoid you, your Honor.

3 THE COURT: Before we get started on the agenda, Judge  
4 Daniels referred to me the case of John Doe v. Bin Laden which  
5 is brought by Judicial Watch Incorporated. It was filed in  
6 2009 apparently in the District of Columbia and I guess just  
7 recently found its way here. Is that a case you folks are  
8 familiar with?

9 MR. CARTER: Your Honor, it is it's a suit filed  
10 against Afghanistan and Osama bin Laden on behalf of as I  
11 understand it a family member of one victim of the attacks. It  
12 went up to the circuit previously and the circuit remanded the  
13 case for discovery related to subject matter jurisdiction under  
14 the Foreign Sovereign Immunities Act. The counsel for the  
15 plaintiffs in that case, Jim Peterson from Judicial Watch, had  
16 contacted us in advance of the timing for the agenda letters  
17 for Judge Daniels and asked that we simply request that some  
18 discovery schedule be set. And that is what resulted in being  
19 in front of your Honor. I do not believe that either counsel  
20 for the plaintiff or counsel for Afghanistan is present today.

21 THE COURT: So we'll leave that for another day. Is  
22 that what you propose?

23 MR. CARTER: I think that's correct your Honor.

24 On a somewhat related note, as several of us were  
25 walking here this morning the Second Circuit issued three

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1 decisions on the appeals that had been argued in December.  
2 Frankly, we really haven't had a chance to even survey them  
3 yet. As I understand it 11 or 12 defendants had been remanded  
4 to the district court for jurisdictional discovery, so in the  
5 hallway outside we spoke to our colleagues on the defense side  
6 and suggested that it might make sense for us all to take stock  
7 of the decision and come back in May and discuss with your  
8 Honor a comprehensive discovery schedule going forward.

9 THE COURT: That certainly makes sense. Are there  
10 defendants who have been remanded for merits discovery who are  
11 potential deep pockets in the case, if I could put it that way?

12 MR. CARTER: Your Honor, my understanding is that the  
13 banking defendants that had been dismissed on 12(b)(6), their  
14 dismissals are affirmed. There's at least one corporate  
15 defendant that's been remanded for jurisdictional discovery as  
16 well as a relatively insignificant defendant also as well as a  
17 number of the other defendants, as I understand it, again, I  
18 haven't read the decision, are officials of certain of the  
19 charities that are presently before the Court for discovery.

20 MR. KABAT: I can confirm there is no merit discovery.  
21 There is jurisdictional discovery. The circuit limited  
22 jurisdictional discovery, specifically 27 and 28 of their  
23 opinion, so we'll be discussing that among ourselves with  
24 counsel and proposing a jurisdictional discovery.

25 I just wanted to mention that we think that that

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1 jurisdictional discovery schedule should be separate from the  
2 merits discovery currently underway. In other words, there's  
3 no reason to stop the merit discovery while the jurisdictional  
4 discovery is underway, so we would just be on two tracks.

5 THE COURT: Well, whether it should be one or two is  
6 something we will take up in May. We don't have a date in May.  
7 We haven't scheduled out that far.

8 MR. CARTER: We don't, your Honor. I know Mr. Kabat  
9 has suggested possibly May 13, 14 or 15.

10 MR. KABAT: We have several dates we'd like to  
11 propose; May 13, 14 or 15 or after Memorial Day, May 30th and  
12 31.

13 THE COURT: My criminal duty is the week of May 13 so  
14 that doesn't work.

15 MR. CARTER: The 30th or 31 they had suggested is okay  
16 with us as well.

17 THE COURT: Either of those days is fine at the  
18 moment. Shall we say the 30th?

19 MR. CARTER: That's fine, your Honor.

20 THE COURT: At 11, is that when you've been usually  
21 doing this?

22 MR. CARTER: It is, your Honor.

23 THE COURT: So May 30th at 11.

24 MR. CARTER: Your Honor, one mild point of  
25 clarification based on what Mr. Kabat said. We were discussing

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1 in the hallway adjusting the schedule for merits discovery as  
2 well, so I assume that's an issue we'll take up on May 30.

3 THE COURT: I consider all of that on the table.

4 MR. CARTER: Thank you, your Honor.

5 MR. McMAHON: Your Honor, can you consider pushing  
6 that back to 12:00? It's quite an inconvenience for me coming  
7 from Washington, D.C. to catch the 8:00 train.

8 THE COURT: Sure. If that's convenient for everybody  
9 else, I have no problem with that. Noon it is.

10 I guess that brings us to the application with respect  
11 to the plaintiff's privilege log, a healthy portion of which is  
12 documents that are subjected to the protective order in Linde  
13 v. Arab Bank, which I guess is before Judge Gershon in the  
14 Eastern District, is that correct?

15 MR. HAEFELE: That's correct, your Honor.

16 THE COURT: And if the only reason why that's part of  
17 the privilege log is that there's a protective order in place.

18 I guess the first question I have is why the two sides  
19 should not be making a joint application to Judge Gershon to  
20 lift that order to the extent that the materials can be  
21 provided for use in this case.

22 MR. COTTREAU: Your Honor, maybe I can just start.  
23 Steve Cottreau for Dubai Islamic Bank and I guess my views are  
24 in the brief for all the moving defendants. The order, the  
25 confidentiality order itself in paragraph 12 sets forth a very

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1 specific procedure for situations like this where the documents  
2 subject to the order, and that order is Exhibit 4 to our  
3 opening moving papers --

4 THE COURT: Yes. I'm turning to it now.

5 MR. COTTREAU: It's on page 16, paragraph 12. It sets  
6 forth a very specific procedure that the plaintiff should have  
7 followed, and that is, within three days of getting the  
8 document requests that called for these documents they were  
9 supposed to give their bank's counsel notice and then wait  
10 until the last day the documents were due to produce them. I  
11 understand that that didn't happen, but they've now given -- I  
12 don't want to -- there's no recriminations about it, we want  
13 the documents, we're happy to get them now. We understand that  
14 the plaintiffs from their opposition brief reached out to Arab  
15 Bank's counsel who didn't raise any objections save one with  
16 respect to one of the documents. It was --

17 THE COURT: Say that again? I'm sorry, I missed the  
18 last part.

19 MR. COTTREAU: We understand that plaintiff's counsel  
20 from their opposition papers have now reached out to Arab Bank,  
21 told them what documents they were withholding. Arab Bank  
22 raised only one objection and only with respect to one document  
23 and that objection was that one of the documents was obtained  
24 by a letter rogatory process and the government that approved  
25 the release of that document did so based on the understanding

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1 that there was this confidentiality order in place, but also if  
2 the government had that understanding it would also have the  
3 understanding from paragraph 12 that there was a way to get  
4 these documents by process or document request, and so we don't  
5 even see that being a bar as to the release of that one  
6 document. So if anybody should be in here objecting it ought  
7 to be Arab Bank. We understand they're not objecting, so we  
8 don't see any reason why that document shouldn't be produced to  
9 us today.

10 MR. HAEFELE: Your Honor, Robert Haefele from Motley  
11 Rice for the plaintiffs. I'm standing principally because it's  
12 Motley Rice that's sort of in the crosshairs here.

13 THE COURT: Because you're in the other case?

14 MR. HAEFELE: We're counsel in the Linde case and  
15 we're subject to the protective order and the documents that  
16 are at issue here are covered under a protective order based on  
17 a designation of confidentiality in the Linde case. So we  
18 couldn't produce them here, but they are nonetheless responsive  
19 to discovery requests here. And we, Motley Rice in particular,  
20 feels caught in the crosshairs here between the various  
21 obligations here. On the one hand --

22 THE COURT: But you're not opposing their production  
23 but for the protective order, correct?

24 MR. HAEFELE: Yes. We made it very clear to counsel  
25 in this case as well as to the Arab Bank counsel that our



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1 purpose for, quote-unquote, opposing the production here is  
2 because we need to maintain the confidentiality order and we're  
3 not in a position to violate it, the Court's confidentiality  
4 order. Arab Bank has the interest in maintaining the  
5 document's confidentiality. The plaintiffs have an interest  
6 and Motley Rice has an interest in maintaining the integrity of  
7 the confidentiality order of the Eastern District of New York.  
8 I have in fact, your Honor, provided notice to Arab Bank's  
9 counsel and they have -- just to clarify one thing and I'm not  
10 in a position where I really want to make Arab Bank's  
11 arguments, but I want to clarify one thing that Mr. Cottreau  
12 said. I don't think from my discussions with Arab Bank they  
13 have made it clear that it's not just that one document that  
14 they have a problem with that was not produced, it's the whole  
15 set they have, but they were giving that one document that was  
16 an example as a particular example that stuck out to them.

17 THE COURT: Is there any reason why -- let me go back  
18 a second. You made a determination that among the set of  
19 documents that you reviewed in the Linde v. Arab Bank case, the  
20 ones that are on the privilege log are relevant ones which are  
21 covered by the protective order, correct?

22 MR. HAEFELE: Correct, your Honor.

23 THE COURT: You have no objection to their release.  
24 Arab Bank hasn't come in, the defendants, the moving defendants  
25 want the documents just to be on the safe side, why shouldn't

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1 you -- to make it more generic, why shouldn't the plaintiffs  
2 and the moving defendants be moving from Judge Gershon to lift  
3 the protective order to the extent of allowing the use of the  
4 documents in this case, if she sees fit and in that context  
5 where Arab Bank is a party it could come in before Judge  
6 Gershon and articulate whatever arguments it has as to why the  
7 document should not be produced. I understand there's a  
8 procedure set forth in the protective order, but just as a belt  
9 and suspenders approach, what's wrong with that?

10 MR. HAEFELE: The only concern I have there, your  
11 Honor, is I would need to consult with my colleagues in Motley  
12 Rice who are closer to that case to determine what our  
13 obligations are to our clients and what the concerns would be  
14 of doing that relevant to those clients.

15 THE COURT: That's an open case?

16 MR. HAEFELE: It is an open case, your Honor, yes.

17 THE COURT: And what does that case involve?

18 MR. HAEFELE: It involves allegations that Arab Bank,  
19 among other things, allegations that Arab Bank had procedures  
20 in the Middle East related to helping the families of  
21 terrorists and engaging in conduct that encouraged terrorist  
22 conduct. That's a very broad description.

23 THE COURT: Your situation in that case is not  
24 dissimilar from where you're positioned in this case. I  
25 understand your desire to proceed cautiously. Why don't I say

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1 that within one week you'll send me a letter telling me whether  
2 there's from your perspective some problem with the procedure I  
3 proposed?

4 MR. HAEFELE: Your Honor, could we get a little bit  
5 longer, like ten days? I'm going to be away from my office. I  
6 need to discuss it with them.

7 THE COURT: We'll make it two weeks. Okay. So we've  
8 dealt with a healthy portion of the privilege log. What are  
9 the other complaints about it? Mr. Cottreau?

10 MR. COTTREAU: Your Honor, the other chief complaint  
11 that we have about the privilege log is how the plaintiffs have  
12 approached the FOIA documents that they've sought and the  
13 correspondence that they've had in seeking those documents.  
14 There are really three categories of FOIA documents at issue.  
15 First, it's the documents, the underlying documents that were  
16 produced by the government to plaintiffs. Second, it's the  
17 plaintiffs' requests and followup correspondence to the  
18 government, and, third, it's the government's correspondence  
19 back to plaintiffs.

20 What plaintiffs have done is they've taken sort of a  
21 half-waiver approach here if you bought the idea that there was  
22 some kind of protection. They've produced the documents -- as  
23 we understand it they've produced all the documents they've  
24 received from the government that are responsive to any of the  
25 document requests.

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1 THE COURT: Let me pause for a second. That's my  
2 understanding, but that's correct, is that right?

3 MR. CARTER: Your Honor one caveat to that. The FOIA  
4 productions from government agencies continue. It's sort of  
5 like a surprise that arrives on your desk from 2009 and you  
6 receive something. I think we may have received a package last  
7 week that we have not produced, but with that exception I think  
8 that's correct.

9 MR. COTTREAU: We wanted to confirm there is some  
10 confusion about it, because they referred in their opposition  
11 to all of the responsive evidentiary documents and just wanted  
12 to be certain there wasn't anything hidden in the term  
13 "evidentiary," it's all the documents you received from the  
14 government.

15 MR. CARTER: That's correct, your Honor.

16 MR. COTTREAU: So that leaves us with the remaining  
17 two categories of documents. The reason why we're seeking this  
18 correspondence between plaintiffs and the government is really  
19 six principal reasons, your Honor. One is we don't know where  
20 these documents came from. We couldn't authenticate them, we  
21 couldn't get originals under the best evidence rule, we  
22 couldn't cast doubt on their authenticity without knowing where  
23 the plaintiffs got them. By stripping away the cover letter  
24 correspondence they now have sort of hidden who the custodian  
25 of these documents really is.

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1           Second, the documents, and you can see this in Exhibit  
2   1 to our reply, were produced with portions redacted often, and  
3   so what we'll receive is a portion of the documents redacted,  
4   but we've obtained from the plaintiffs because they've produced  
5   some of their correspondence with the government, when they  
6   correspond with the government the government will explain to  
7   the plaintiffs exactly why something was redacted in one of the  
8   documents that we have. It will say the name of the officer  
9   was omitted pursuant to a privacy protection and they'll cite  
10  the rule in 5 U.S.C. 552 that they're relying upon, the FOIA  
11  exemption for that information.

12           THE COURT: This is in reply Exhibit 1?

13           MR. COTTREAU: Exhibit 1.

14           THE COURT: Right, I see.

15           MR. COTTREAU: They produced selected correspondence  
16  with the government. I'm not sure why they produced this  
17  versus other, but we have it, and you can see the important  
18  kind of information that's in it, which is the explanation  
19  about the redactions and often you can tell whether a redaction  
20  is substantive or non-substantive from that correspondence.

21           THE COURT: Well, they don't tell you -- well, I  
22  forget whether the documents themselves will have a  
23  specification exemption. I assume they don't, right?

24           MR. COTTREAU: I believe some do and some don't, your  
25  Honor.

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1 THE COURT: Okay.

2 MR. COTTREAU: It's mixed. In my experience sometimes  
3 those stamps might not be exhaustive.

4 The third reason why we're seeking this information is  
5 because there are documents that are withheld, categories of  
6 documents withheld, the correspondence with the government,  
7 some of the sample correspondence in Exhibit 1 explains that,  
8 explains what documents are being withheld. It helps put the  
9 documents that we do have from plaintiffs and that they have in  
10 context, what's missing, what portions have been omitted of a  
11 set of documents.

12 Fourth, the fact that the documents themselves exist  
13 or don't exist within a certain agency may aid certain  
14 defendants in rebutting some of the allegations by plaintiffs.  
15 There are allegations of government meetings, allegations of  
16 government communications and the fact that those don't exist,  
17 which are revealed in these letters from the government are  
18 very relevant to the defense of some of the defendants.

19 Fifth, there are communications and again, Exhibit 1  
20 in this selected communications from the government reveals  
21 this, there are communications with plaintiffs' fact witnesses.  
22 In Exhibit 1 there's references to e-mails that we previously  
23 sent to you regarding Richard Newcomb who is the director of  
24 OFAC at the time. So we understand omitted from this  
25 correspondence from the government to the plaintiffs are

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1 correspondence itself with witnesses in this case. And so we  
2 want, obviously, the documents from the government that would  
3 reveal that.

4 And then last, sixth, the whole notion that we would  
5 have to go to these government agencies ourselves, make our  
6 identical requests, would be a burden on those agencies  
7 themselves. There are subdivisions, including subdivisions --

8 THE COURT: Wholly apart from making the same  
9 requests, why couldn't you make a FOIA request for their FOIA  
10 requests?

11 MR. COTTREAU: We believe we can, your Honor. There  
12 is no exemption that applies in 5 U.S.C. 552(b). We believe  
13 we're entitled to that. That's the next step obviously and we  
14 don't believe the plaintiffs could restrict the government from  
15 revealing both the communications they received from plaintiffs  
16 and the communications that they made to plaintiffs. In fact,  
17 what's fundamentally wrong with their work product argument is  
18 work product applies to the documents themselves. Plaintiffs  
19 can't restrict the government from releasing them, we don't  
20 believe and if they could, that would be an extraordinary  
21 proposition.

22 THE COURT: Well, if this weren't in the FOIA context,  
23 the selection of documents or categories of documents that the  
24 plaintiffs sought to seek arguably it seems to me could be work  
25 product. There's a Third Circuit case some of you may be

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1 familiar with, Sporck v. Peil which I guess is the first in the  
2 line of cases taking that view, but here there's been a  
3 disclosure to a third party, namely, the United States.

4 MR. COTTREAU: Yes, and a couple of relevant points.  
5 Sporck is documents that the government specifically arranged  
6 and showed to a witness in a deposition. We're not asking for  
7 all documents that you think are relevant or that you believe  
8 you're going to use in your case that you received from the  
9 government or some way that involves attorney selection. The  
10 better analogy is to Rule 34 and to Rule 45. Rule 45 in  
11 subsection B specifically requires service on other parties of  
12 your subpoena to third parties and indeed if they would have  
13 provided instead of by FOIA by Rule 45 indeed we would have had  
14 these requests. There should be no different outcome under  
15 FOIA than by Rule 45.

16 THE COURT: Okay. Mr. Haefele?

17 MR. HAEFELE: Thank you, your Honor. First I think  
18 there's an asymmetry here that begs to be called to your  
19 Honor's attention. The defendants that are principally arguing  
20 on behalf of this motion they're defendants who haven't  
21 themselves produced most of the basic documents that they're  
22 obligated to produce in the course of discovery, even when the  
23 Court's issued orders and even when the documents have been  
24 shown to exist, and now they come to us and they complain about  
25 the margins of discovery here where we have given, plaintiffs



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1 have given the defendants the substance of the discovery, the  
2 essence of the substantive documents, the actual substantive  
3 documents that would be admitted at trial. And all of that --

4 THE COURT: I guess I perhaps feel your pain but I'm  
5 not sure that's at all relevant to the issue here.

6 MR. HAEFELE: What we're seeking to prevent, your  
7 Honor, is the disclosure of plaintiffs' counsel's core work  
8 product. The essence of not just Rule 26 which my colleague on  
9 the other side has focused on but what is protected under  
10 Hickman which is broader than just Rule 26. We think we're  
11 protected under Rule 26 because by the terms of Rule 26 what  
12 we're seeking to protect here are documents that were prepared  
13 by the plaintiffs' counsel or for the plaintiffs' counsel and  
14 there are documents that fall directly under Rule 26. But even  
15 if they're not directly under Rule 26 what we're seeking to  
16 prevent disclosure of is at the core of what's protected in the  
17 Hickman case which is the thought processes, the paring down of  
18 the documents that are being sought.

19 If you look at the documents that we're seeking to  
20 protect, your Honor, the information that's in them that's at  
21 the core of the Hickman case is the documents that talk about  
22 the dialogue back and forth as to what the plaintiffs' counsel  
23 would prioritize in the discovery process. If you can't give  
24 us this, then, you know, we would accept this, and no, for  
25 instance, another example would be you've told us that you

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1 don't have these documents but we know XYZ so therefore we're  
2 positive that there are documents that fall within this  
3 category.

4 THE COURT: Well, let me interrupt you for a second.  
5 There are the, I assume the kitchen sink initial requests which  
6 are included among the documents in your privilege log, is that  
7 correct?

8 MR. HAEFELE: I think they are, yes, your Honor.

9 THE COURT: It seems to me as to those, the theory  
10 you're advancing to me now doesn't apply because they are very  
11 broad requests without prioritization and presumably without  
12 discussion of why you want them.

13 MR. HAEFELE: No, I don't think that's true, your  
14 Honor. I think there were very specific requests made within  
15 those requests. And so I don't know that the broad category  
16 that you're talking about -- I mean, what we may have done is  
17 we may have gone through certain documents and culled out what  
18 we thought were the most important documents. For example,  
19 going through the 9/11 Commission report and focusing on what  
20 we thought were the core documents that we would need from the  
21 9/11 Commission report in making requests from the various  
22 agencies that created those documents for those sorts of  
23 things. So that is plaintiffs' lawyers looking at something  
24 and using their minds to determine what is important.

25 THE COURT: Let's assume that the day before you

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1 mailed that letter when it was still sitting on your desk, you  
2 or one of your colleagues, it was work product. One of the  
3 things that you have to show in order to rely on the work  
4 product doctrine is that you didn't make disclosure to somebody  
5 in circumstances that rendered it more likely that those  
6 documents would be disclosed. And here, unless I'm missing  
7 something, if Mr. Cottreau were to submit a FOIA request to the  
8 various government agencies saying we want anything that  
9 Mr. Haefele sent to you requesting information about 9/11, that  
10 probably would be turned over.

11 MR. HAEFELE: Your Honor, I'm not sure that it's that  
12 easy. As we ourselves have found, and I propose that others in  
13 this room who are lawyers who have made FOIA requests have  
14 found, what you get from the discovery process in FOIA is not  
15 necessarily a clean document that demonstrates exactly what  
16 happened. There are going to be redactions, more likely than  
17 not there are going to be redactions, sometimes wholesale  
18 redactions, and as I'm sure counsel for DIB knows for certain,  
19 there are also processes in place by which the agency that's  
20 having the documents sought from will go to the party who has  
21 an interest in the documents, presumably in that case to the  
22 plaintiffs' lawyers and ask whether or not there is any reason  
23 why those documents should not be produced and in this case our  
24 argument would be exactly what we're proposing here today, that  
25 the core work product of the plaintiffs' lawyers is contained

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1 within the documents. If there's any production, that has to  
2 be redacted out.

3 THE COURT: Is there on either side any case law  
4 that's applicable that has not been presented to me in these  
5 letters?

6 MR. HAEFELE: I can tell you, your Honor, that there  
7 are some cases that were cited in the defense counsel's  
8 opposition, or reply brief. At first instance I would say that  
9 some of those cases are not exactly as proposed and they're not  
10 as on point as we would like them to be or that defense would  
11 like them to be, I suppose, and that's the, I think it's the --

12 THE COURT: The Grand Jury? I assume it's not  
13 Klamath, which is one of the basic cases In Re: Steinhart?

14 MR. HAEFELE: No, I think it was the Egiazaryam case,  
15 I have a case that was cited along with that.

16 THE COURT: Well, in any event you're telling me you  
17 want to respond to what they've said.

18 MR. HAEFELE: Well, I think one of the things that I  
19 wanted to call to the Court's attention and I wish I could find  
20 it in my notes, but in the Egiazaryam case, I think it is. I'm  
21 probably butchering the name of the case.

22 THE COURT: The second name is Zalmayev, and madam  
23 reporter, the first name which may or may not have been  
24 pronounced correctly, is spelled E-g-i-a-z-a-r-y-a-m.

25 MR. HAEFELE: And I would suggest also in the Skanska

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1 case which was cited along with that. The factual  
2 underpinnings of those cases are very different than the cases  
3 we have here because the parties that were involved in that,  
4 the documents that were related to those parties were third  
5 parties that have nothing to do with the litigation. In this  
6 instance, the documents being sought are documents to and from  
7 the plaintiffs' lawyers which is different from, that's as if  
8 you're asking for the substantive documents that we've already  
9 agreed to produce. That's what those cases are really more  
10 aligned to deal with. I think if you look at those cases  
11 what's interesting is that one or more of those cases actually  
12 site the Ricoh versus I think it's the Aeroflex case. Within  
13 that case --

14 THE COURT: How do you spell Ricoh?

15 MR. HAEFELE: R-i-c-o-h, v. A-e-r-o-f-l-e-x, 219 FRD  
16 66 at 70, which the defendants admit in their brief which  
17 discusses three e-mails an attorney sent to a third party  
18 seeking information to develop the client's case. The Court  
19 found that the e-mails were work product because work product,  
20 is, quote, intended to preserve a zone of privacy in which a  
21 lawyer can prepare and develop lead strategies with an eye  
22 towards litigation free from unnecessary intrusions by  
23 adversaries. I think that's quoting U.S. v. Adelman, and goes  
24 on to say that to the extent that the e-mails reflect counsel's  
25 strategy for establishing a claim or defense, they would

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1 constitute protected attorney work product and that's pretty  
2 much what we're arguing here. To the extent that the documents  
3 they're seeking to and from the plaintiffs' lawyers reveal the  
4 plaintiffs' lawyers' thought processes, they would constitute  
5 protected attorney work product.

6           Responding to a few things that Mr. Cottreau did say.  
7 Your Honor, I think he articulated the fact or his argument  
8 that the documents that he's asking for go to the  
9 authentication, without them it's impossible to determine the  
10 authentication of the documents, the substantive documents.  
11 The problem with that argument is I think in most instances on  
12 the very face of the documents it's indicated what the  
13 redactions were as well as the reasons for the redactions and  
14 they're consistent across all FOIA redactions. And I think  
15 they also indicate who it is that was the entity from which the  
16 document was generated, so that the document itself indicates  
17 who it comes from and it also indicates ordinarily who did the  
18 redactions.

19           More so, as Mr. Cottreau has indicated, we have  
20 already offered to give them the cover letters and that's the  
21 examples he has provided, the cover letters without any thought  
22 processes, if there's anything of the thought processes in a  
23 document we would redact that. In our negotiations, your  
24 Honor, we told them we would give them the substantive  
25 documents and we agreed to give them cover letters to the

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1 extent that they did not reveal attorney work product, that  
2 that's something that they did not want. However, some of  
3 those documents were in fact produced.

4 In a sense, the key question here is whether  
5 respecting the claim of work product privilege is supportive of  
6 the adversarial system and the purpose of the work product  
7 doctrine as it's enunciated in the Hickman case. That includes  
8 both under federal civil procedure Rule 26 as well as the  
9 purposes of Hickman which are pretty much to protect that zone  
10 of privacy that the lawyers are preparing their case in and  
11 preventing the adversary from freeloading or interfering with  
12 opposing's counsel preparation of ongoing litigation. That's  
13 what we're seeking to protect, your Honor.

14 THE COURT: I understand you view this as consistent  
15 with the spirit of work product. I think that the key question  
16 and neither side has cases directly on point as to it, is  
17 whether disclosure of that thought process to the United States  
18 government does or does not render it more likely that third  
19 parties such as Mr. Cottreau will learn the contents of the  
20 documents. It's an interesting question. It's one I want to  
21 spend some time thinking about. I had asked you earlier if you  
22 want to submit a further letter discussing the cases raised in  
23 the reply brief. You've discussed them orally. I certainly  
24 will look at them, but I want to give you the opportunity to  
25 submit a further letter if you want to. You shouldn't feel

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1 obligated to.

2 MR. HAEFELE: We will take that opportunity, your  
3 Honor, but I also wanted to, in terms of a case that's more on  
4 point. I do think that the In Re: Student Finance Corporation  
5 case that we did cite in our brief which among the items that  
6 are identified as being within the work product category for  
7 the FOIA requests --

8 THE COURT: Okay.

9 MR. HAEFELE: I think that's 2006 U.S. District Lexis  
10 86603, November 29, 2006.

11 THE COURT: If I say your letter will be submitted  
12 within two weeks also, is that okay?

13 MR. HAEFELE: That's fine, your Honor.

14 MR. COTTREAU: Your Honor, just because I don't want  
15 to be deceived in any way, plaintiffs cite two different cases  
16 in their brief in support of the notion that FOIA is work  
17 product protected. In Re: Student Finance is one. The second  
18 is Ron Pallon (ph). I believe both of these cases are out of  
19 the Eastern District. Ron Pallon v. Home Indemnity Company.  
20 The discussion of the issue is extremely cursory in both cases.  
21 Neither one, for example, considers the Rule 34, Rule 45 kind  
22 of analogy. Neither one gets much into the language of what  
23 type of relationship you need to have with the party that  
24 you're disclosing to, or indeed with respect to these documents  
25 it's government correspondence in many cases. The notion that



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1 plaintiffs can convert the government into their work product  
2 producing machine, that they can then tell the government and  
3 us they can't produce the correspondence is an extraordinary  
4 proposition. And I don't think either one of those cases ever  
5 comes to grip with that notion. It also doesn't come to grips  
6 with the notion that we have in this case which is reflected in  
7 these communications, our communications with material fact  
8 witnesses that plaintiffs themselves have put on their witness  
9 list against us. The notion that plaintiffs can write a  
10 letter, send it to a third party witness discussing either that  
11 witness's documents or testimony and then put that witness on  
12 at trial and have us shielded from that communication with a  
13 third party that it has no relationship with --

14 THE COURT: Give me a concrete example of what you're  
15 talking about.

16 MR. COTTREAU: Sure. If I was representing an  
17 accounting firm and there were bank records and there was going  
18 to be a bank that were at issue in a securities fraud case and  
19 the bank's a third party to the case, like the U.S. government  
20 is here, a third party to this case, and I sent a letter saying  
21 hey, here's the kind of documents we're looking for, and they  
22 write back and say here's the e-mail to the witness you're  
23 going to call at trial, which is exactly what is shown in  
24 Exhibit 1 to our reply. Oh, it says we sent an e-mail to  
25 Richard Newcomb. You have it, here it is on the topic of the

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1 documents. They're having communications with third party  
2 witnesses in this case that are reflected in some of these  
3 communications. We don't have them all because there are over  
4 200 documents on their privilege log, but they're having  
5 communications with potential witnesses at trial. That also  
6 has no work product protection. You need to have some  
7 relationship with the party who is generating work product for  
8 you or that you're disclosing your work product to in order to,  
9 one, qualify for the protection and two, to maintain the  
10 protection. These weren't prepared by the governments for  
11 plaintiffs as litigants. These were prepared by the government  
12 because it was required to under statute, and that's not work  
13 product.

14 And disclosure to the government, with all due respect  
15 to my colleague that they qualify for some 552(b) exception to  
16 the disclosure, they do not. If you take a look at 5 U.S.C.  
17 552 and the exceptions in subsection B, they don't qualify for  
18 any of them. These would have to be disclosed. We know who  
19 the 42 subdivisions of the government are that they sent these  
20 to. We could certainly obtain it by FOIA. This is a much more  
21 efficient way of doing it. It doesn't reveal much more than  
22 what we get through a FOIA request itself. Like the Arab Bank  
23 case the approach seems to be here to make us jump through  
24 additional hoops when this should have already been taken care  
25 of. They want to produce the cover letters because they don't

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1 think the cover letters qualify for work product protection.  
2 Produce the cover letters. I don't understand why you go  
3 through the business of putting them on a log and now you'll  
4 say they'll produce them. Excuse my frustration but both of  
5 these seem to be issues that could have been headed off.

6 THE COURT: Well, there are cover letters that you're  
7 willing to produce, which you said Mr. Cottreau didn't want  
8 because he wanted all of them.

9 MR. COTTREAU: I didn't want them redacted your Honor,  
10 they were going to redact them for things they thought the  
11 government was saying that was their work product.

12 THE COURT: But there are cover letters that you're  
13 not proposing to redact, is that correct?

14 MR. CARTER: Your Honor, there are cover letters that  
15 we would be willing to produce. The essential breakdown in  
16 regard to the production of those documents is that we  
17 approached the meet and confer as an effort to reach a  
18 compromise and when they expressed the concern about the  
19 inability to authenticate and the other issues we offered them  
20 the cover letters to address that concern in the hopes we could  
21 meet in the middle. Ultimately that was rejected and we were  
22 told that they wanted everything.

23 THE COURT: Well, if there are ones for which you  
24 would not propose to redact on the work product theory that  
25 you're espousing, I think those should be turned over. In

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1 addition to the letter which I've asked Mr. Haefele for, I  
2 would like to be provided in camera with a representative  
3 sample of the types of letters that we're talking about. If  
4 there's an extensive list of them, I certainly don't want all  
5 of them but I guess they may fall into some broad categories  
6 and I'd like specimens of those so that I have some sense of  
7 what you're talking about and I suppose it would be helpful  
8 also to have indicated what you would propose to redact from  
9 those various sample specimen letters.

10 MR. CARTER: That's fine, your Honor. That proposal  
11 actually addresses an issue I was going to raise. Mr. Cottreau  
12 made an example that there were communications with Richard  
13 Newcomb who was the head of the Treasury Department, received  
14 communications by virtue of being the head of the Treasury  
15 department. That was referred. It's not as if there were  
16 material conversations about witness testimony, but that would  
17 be evident, I think.

18 MR. COTTREAU: Your Honor, one other just quick point  
19 because I don't like to be lost, which is that Cozen O'Connor  
20 was an adversary of the U.S. government in this process. They  
21 sued the U.S. government. The case is cited in our reply  
22 brief, but also at Exhibit 4 to our reply brief they filed much  
23 of this correspondence publicly and we have a real issue here  
24 with selective waiver. They're going to give us the  
25 attachments to the correspondence but they're not going to give

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1 us the correspondence their self. Under Exhibit 1 to our reply  
2 brief they're going to give us the favorable, presumably that's  
3 why they produced it to us, the favorable correspondence they  
4 want to rely on it, but they're not giving correspondence that  
5 could put it in context, rebut it. We have a real selective  
6 waiver issue here as well.

7 THE COURT: I think the first question is does the  
8 work product protection apply. If it doesn't, then I don't  
9 have to worry about issues like selective waiver and the like,  
10 so I think I need to take this in steps.

11 MR. COTTREAU: Sure.

12 THE COURT: And I understand the concern. I'm not  
13 unsympathetic to what Mr. Haefele said with respect to the  
14 spirit of work product, I guess it just comes down to whether  
15 it meets the requirements of a legitimate work product claim  
16 and it's an interesting question that I don't claim to know the  
17 answer to at this point.

18 MR. HAEFELE: Your Honor, one final point, though.

19 THE COURT: Yes.

20 MR. HAEFELE: And I don't know that we're at this  
21 juncture yet because it sounds like your Honor wants to see  
22 more before your Honor makes a decision, but we did want to  
23 make it clear that to the extent that, whatever the Court's  
24 ruling about production of the FOIA communications or FOIA like  
25 communications, plaintiffs ask that they be reciprocal in that

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1 whatever the plaintiffs were obligated to produce or the  
2 categories that plaintiffs are obligated to produce the  
3 defendants will be obligated to produce as well.

4 THE COURT: That would follow logically.

5 MR. HAEFELE: Specifically on that, your Honor, we  
6 would like to make sure that it is not only the communications  
7 relative to each parties' own FOIA or FOIA like request but for  
8 example in somebody from DIB interposed one of those objections  
9 I talked about earlier with regard to FOIA requests that the  
10 plaintiffs have made we would like those revealed as well.  
11 They haven't been revealed on a privilege log but we understand  
12 those exist. For example plaintiffs make a request for  
13 documents to DIB to an agency. The agency then goes to DIB and  
14 says these requests have been made. DIB says no, no, no, don't  
15 produce those and then we get a response back saying we have  
16 nothing to produce. We would like those communications as  
17 well.

18 THE COURT: You wouldn't get a response saying we have  
19 nothing to produce, you would get a response saying we have  
20 concluded that there are responsive documents but that they  
21 fall within one of the following exemptions and an explanation  
22 of why.

23 MR. HAEFELE: Regardless of the response, your Honor,  
24 we would want the communications that DIB or whatever other  
25 defendant. I'm just using them as an example.

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1           THE COURT: Let me deal with the work product issue  
2 first. If I determine that the materials have to be turned  
3 over, then we'll talk about reciprocity. If I determine that  
4 you're correct, I don't have to worry about that, it seems to  
5 me. Correct?

6           MR. HAEFELE: I think that's right. I just want to  
7 make sure that it's raised, your Honor, that whatever you order  
8 is reciprocal.

9           THE COURT: Okay. Well, if I don't treat it in my  
10 decision, we'll talk about it after I issue my decision. Okay?

11          MR. COTTREAU: Your Honor, just one last thing on the  
12 case law set while you're considering, they cite and rely very  
13 Haefele on the Plew case, and that case is indicative of a lot  
14 of the work product cases that you see. When you have a third  
15 party that's producing work product there's some relationship  
16 here. The Plew case was a patent infringement case. The suit  
17 was against the infringer, which was The Limited or Victoria's  
18 Secret in this case. The work product was generated with the  
19 supplier or manufacturer of the allegedly infringing article.  
20 There's a contractual relationship, they also have a common  
21 interest in having the product to be found not to have  
22 infringed. That's the typical third party relationship you see  
23 in work product space.

24          MR. HAEFELE: Your Honor, if we could respond to that.  
25 In this instance, in that instance, first of all, in the Plew

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1 case, the fact that there was a contractual relationship was  
2 mentioned at the very beginning of the case and the rationale  
3 of the case it was not even mentioned. I can't tell whether  
4 it's part of the rationale or not.

5 THE COURT: As I guess I've made abundantly clear I  
6 haven't read any of the cases. I haven't said that expressly  
7 but my ignorant questions should have revealed it, except to  
8 the extent that I dealt with them in prior FOIA cases, all of  
9 this is tabula rasa.

10 MR. HAEFELE: Thank you.

11 MR. COTTREAU: Your Honor, just with a pin cite on  
12 that discussion from Plew. We cite the Lexis version, it's at  
13 star page 9. When they say the interests are aligned they say  
14 the interests of DBA as the supplier to Victoria's Secret the  
15 targeted bras are aligned with those of the defendants. That's  
16 directly from the Court.

17 THE COURT: I will read the cases as well as Mr.  
18 Haeefe's additional letter and I will look at the documents  
19 and rule as quickly as I can.

20 Anything else we should take up today?

21 MR. HAEFELE: Yes, your Honor. There are some other  
22 items that were on the agenda letter. In particular I think  
23 items two and three. I think we've covered item one and we've  
24 covered item four, but there are items two and three that we  
25 would ask your Honor to address.



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1 THE COURT: For some reason it's not jumping out at me  
2 here in your letter. What page are we on?

3 MR. HAEFELE: Your Honor, do you need a copy of the  
4 letter?

5 THE COURT: No, I have it. Your March 29 -- maybe I'm  
6 looking at the wrong letter. No, that's the wrong letter. Oh,  
7 I'm sorry, yes, it's the April 10 letter.

8 Yes. As to Mr. McMahon's documents, it seems clear to  
9 me, and I'm only halfway through the stack, that many of them  
10 plainly are attorney-client communications. However, the first  
11 letter in the pile is a November 27, 2007 letter. Mr. McMahon?

12 MR. McMAHON: Yes, your Honor.

13 THE COURT: And I can't for the life of me determine  
14 any reason why that would be considered either attorney-client  
15 or work product.

16 MR. McMAHON: Well, your Honor, I think part of the  
17 problem was that we had sought an extension with Mr. Carter  
18 because we had to collect these documents from different parts  
19 of the office, and at the last minute we incorporated certain  
20 items and that's one that shouldn't have been in there, and I  
21 apologize to the Court.

22 THE COURT: It raises the question of whether it's  
23 responsive to any of the myriad requests that the plaintiffs  
24 have made over time.

25 MR. McMAHON: I think, your Honor, we went back, my

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1 associate and I, Oliver Dorell, and I think there is one  
2 document that has not been given to the plaintiff and it was a  
3 letter that went to the Habib Bank which I'm certain I can  
4 provide Mr. Haefele with and provide him with a letter.

5 THE COURT: That's the one I was referring to. I'm  
6 only about halfway through the pile but there's a November 27,  
7 2007 letter, that's what I've been referring to. So if there's  
8 an additional document you're going to send to Mr. Carter, send  
9 it to him with a copy of the letter to me so I understand  
10 whether it's this document or some other document.

11 MR. McMAHON: Will do, your Honor. Will do.

12 THE COURT: And once I get through the rest of the  
13 materials then we can have a further discussion about all of  
14 that next month.

15 MR. McMAHON: Will that be a part of the May dialogue,  
16 your Honor?

17 THE COURT: Yes.

18 MR. McMAHON: Or is that premature?

19 THE COURT: And then I guess there's a progress report  
20 as to it is Al Haramain Oregon documents. Where do we stand on  
21 that? Mr. Kabat?

22 MR. KABAT: Yes. We produced over 31,000 pages of  
23 documents already which comprise the scans and the materials  
24 that were received during the 2004 search and additional  
25 documents that were produced to the Grand Jury. I can also

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1 impart that we received from the federal public defender  
2 another 8,790 pages that were produced by another attorney to  
3 the Grand Jury, and we plan to produce those on Friday of this  
4 week after completing a privilege review. We have also last  
5 week received over 26,000 e-mails that were recovered from the  
6 Outlook account in PST format. We've completed our privilege  
7 review of those e-mails, segregated out the privileged e-mails.  
8 Now, we hope to get those produced on Friday, although we may  
9 have to do a second production with the Bates stamping as  
10 opposed to the PST format. PST format does have the advantage  
11 of being more readily searchable than a Bates stamp format, but  
12 we would also need the Bates stamp format for depositions and  
13 so forth.

14 And finally we have also received the trial exhibit  
15 from the prosecution in Oregon of Mr. Sayed on the tax charge  
16 and I think there are several hundred exhibits on each side and  
17 while we are not authenticating the exhibits by producing them,  
18 we will be producing those exhibits and I will note that many  
19 of those exhibits were not used at trial and in fact many of  
20 them were excluded and inadmissible through the pretrial made  
21 in Oregon but we will be producing them nonetheless.

22 So that's where we stand in terms of the production,  
23 and I believe I've answered the questions that Mr. Haefele  
24 propounded, although I have not yet done the privilege review  
25 of the 8,790 pages that we got last Friday.

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1 THE COURT: Well, just so I'm clear, every document  
2 will either be produced or be on the privilege log, correct?

3 MR. KABAT: Yes.

4 MR. HAEFELE: Your Honor, I think that answers the nub  
5 of the questions that we had to make sure that every document  
6 was covered under the order that came out of the Oregon  
7 district court would be represented somewhere either on a log  
8 or being produced. As I understand, that's what was just  
9 confirmed as a yes.

10 THE COURT: Correct.

11 MR. HAEFELE: The other question we had, your Honor,  
12 was whether or not we could get some delineation as to which of  
13 the documents were among the seized documents, which were among  
14 the Grand Jury documents and there's a third category I think  
15 of which documents came from the accountant as well, which  
16 presumably would be a smaller set of documents but I think  
17 those were sort of the three categories that were referenced in  
18 the Oregon's Court's order, which came from the seizure, which  
19 from the Grand Jury documents and which came from the  
20 accountant.

21 MR. KABAT: I will do a cover letter on the production  
22 itemizing the production by sorts.

23 MR. HAEFELE: Thank you, your Honor.

24 THE COURT: So I'll see all of you folks in May.

25 (Adjourned)